

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL HORACEK,

Defendant-Appellant.

Supreme Court No. 152567

Court of Appeals No. 317527

Oakland County Circuit Court
No. 12-241894-FH

Hon. Shalina Kumar

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**APPELLANT DANIEL HORACEK'S REPLY BRIEF IN
SUPPORT OF HIS APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

In its Answer, the government again relies on a litany of factual assertions that are not found anywhere in the record evidence, just as the trial court did below. The most egregious example of this is the government's lengthy quote from a pre-sentencing investigative report, to which Mr. Horacek had no opportunity to respond, because it was not before the trial court when the motion to suppress was heard. To sustain the validity of a warrantless search of a home or motel room, the burden rests upon the government to demonstrate that the police acted with the reasonable belief that exigent circumstances existed. *People v Oliver*, 417 Mich 366, 378; 338 NW2d 167 (1983). That burden cannot be satisfied by counsel making bald factual assertions in opposition to the motion to suppress in a brief or from the lectern, or by relying on post hoc, double hearsay in a self-serving report created after the motion has been decided.

But even if it could, the trial court still erred in denying Mr. Horacek's motion to suppress. None of the so-called facts proffered by counsel support a reasonable belief that evidence would be destroyed or that officers or the public would be put in danger if officers simply waited to obtain a warrant before breaking into Mr. Horacek's hotel room. And the government also has not carried its burden to show that the constitutional error in denying Mr. Horacek's Fourth Amendment suppression motion was harmless beyond a reasonable doubt. Because Mr. Horacek's plea is indeed conditional under MCR 6.301(C)(2), and was otherwise entered unknowingly and unconstitutionally, the Court should reverse and remand with instructions allowing Mr. Horacek to withdraw his plea.

ARGUMENT

I. **No record evidence and no facts asserted by the government's counsel justified a warrantless search and seizure.**

Whether exigent circumstances exist is a question of objective fact. *People v Blasius*, 435 Mich 573, 593-594; 459 NW2d 906 (1990). “[T]he police must produce specific facts supporting a reasonable and objective belief” that exigent circumstances exist. *People v Blasius*, 435 Mich at 573. When the issue involves determinations of fact, the judge’s duty “as the trier of the facts [is] to weigh the testimony in the case, to determine the factual issues presented in accordance therewith.” *People v Wingeart*, 371 Mich 264, 271; 123 NW2d 731 (1963). It is elementary that arguments of counsel are not evidence. The police must establish with actual evidence “the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.” *In re Forfeiture of \$176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993).

The government relies on the first two circumstances, conceding that Mr. Horacek was unlikely to escape the motel room.¹ (Answer 11.) But the government cites no record evidence showing that officers could have reasonably believed the destruction of evidence was imminent or that a real danger to officers and others existed.

A. **Neither record evidence nor the prosecutor's asserted facts would give officers reason to believe the destruction of evidence was imminent.**

The People attest that “the record supports a finding that one of the occupants of the motel room was attempting to destroy evidence, or at least running toward the bathroom, when

¹ The Court of Appeals mentioned the likelihood of escape only in passing, and did not ultimately express an opinion. (COA Op 3-4.)

the police entered.” (Answer 12.) There is no indication in the People’s brief as to which part of the “record” provides this support. The People’s response to Mr. Horacek’s Suppression Motion did not raise this issue, and made little more than an unsupported assertion that, after an officer knocked and announced, he heard “several people move around inside.” (People’s Br in Supp of Resp to Def’s Mtn to Suppress at 2.) Briefing of counsel is not evidence, but even if it were, this Court has already established that hearing movement of people inside of dwelling is insufficient basis for exigent circumstances. *People v Smith*, 191 Mich App 644, 647 n 1; 478 NW2d 741 (1991).

The People’s brief below also baldly asserts that officers saw a man moving towards a bathroom *after* they unlawfully opened the door without consent. Again, there is no testimony about this in the record, but the argument fails for at least three other reasons as well.

First, even if there were evidence of such movement in the record, the unlawful entry for a search at that point had already happened. The motel may have given its consent to the search by providing the police an access card, but Mr. Horacek did not. *Stoner v State of Cal*, 376 US 483, 489 (1964) (“It is important to bear in mind that it was the petitioner’s constitutional right which was at stake here, and not the night clerk’s nor the hotel’s”). The police could not use events witnessed after the entry as an objective basis for believing such entry was warranted in the first place.

Second, even if evidence was supposedly going to be flushed by the man moving toward the bathroom, that evidence could not possibly have had anything to do with the crime they were investigating—robbery. See *People of Garden City v Stark*, 120 Mich App 350, 351; 327 NW2d 474 (1982) (where arrest warrant for third party for traffic violations led to warrantless search of defendant’s home, finding no exigent circumstances existed: “No exigent circumstances save this

search from unconstitutionality. There was no danger that evidence of the underlying traffic violations would be destroyed.”). What evidence of robbery could Mr. Horacek reasonably have flushed down the toilet?

Finally, the mere movement of a man after the initial entry indicates at most a mere possibility of a risk of immediate destruction, which this Court has already held is not enough. See *People v Blasius*, 435 Mich at 594 (“[T]he most objective and compelling justification would be an actual observation of removal or destruction of evidence or such an attempt. Absent such compelling facts, the police must present facts indicating more than a mere possibility that there is a risk of the immediate destruction or removal of evidence.”). The Court of Appeals correctly held that there was “no indication of a concern for the destruction of evidence.” (COA Op 3.)

B. Neither the record evidence nor the prosecutor’s asserted facts would give officers a reasonable belief that Mr. Horacek was armed or a danger to officers or others.

The only record evidence that the robber was armed comes from the store clerk, who testified at the preliminary examination that she believed the person who robbed her had something in his pocket that “could hurt her.” After receiving this evidence, and reviewing the videotape of the robbery that officers viewed before entering the motel room, the magistrate concluded there was no probable cause to bind Mr. Horacek over on a charge of “armed” robbery. That ruling alone disposes of this issue.

“Probable cause to arrest exists where the *facts and circumstances* within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of *reasonable* caution in the *belief* that an offense has been or is being committed.” *People v Cohen*, 294 Mich App 70, 75; 816 NW2d 474 (2011) (quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996)). To be charged with armed robbery, there

must be probable cause to believe the robber possessed a weapon, possessed an article fashioned to appear as a weapon, or represented orally or otherwise that he was in possession of a weapon. MCL 750.529. The magistrate ruled that neither the video tape nor the testimony of the store clerk gave probable cause to believe the person robbing the store was armed or had even given the impression he was armed. (6/22/12 Hr’g Tr 35-7.) As the Court of Appeals observed, the person who robbed the store clerk never made overt threats, never displayed a weapon, and never indicated that he had a weapon. (COA Op 3.)

There was no reasonable basis for the police to believe this was a crime of violence. There was no reasonable basis for the police to believe Mr. Horacek was armed. And most importantly, there was no reasonable basis for officers to believe their or anyone else’s lives were in danger if they did not break into the motel room without a warrant. The government has failed to point to any objective facts in the record before the trial court at the time of the suppression hearing that would support such a belief.²

The government and the Court of Appeals argue there was a “possibility” that Mr. Horacek was armed.³ (COA Op 3; see also Answer 12.) But there is almost *always* a possibility

² The government invites this Court to make the same error the trial court did by going outside the dismal record made at the suppression hearing, quoting at length a pre-sentence investigative report (“PSIR”) that was not before the trial court when it ruled on the suppression motion. (Answer 1-2.) The government cannot bolster its position at the pre-plea suppression hearing by pointing to self-serving statements in a post-plea PSIR that Mr. Horacek never had an opportunity to respond to at the suppression hearing.

³ The People also go so far as to specify that the person who robbed the store clerk likely had a “firearm.” (Answer 11.) Once again, the People appear to be layering speculation upon speculation. Not even the store clerk speculated that the person who robbed her had a gun in his pocket; the furthest she would go in her speculation was that the person who robbed her had something in his pocket that might hurt her. (COA Op 3.) The People also further speculate that the occupants of the motel room might have “prepare[d] for a standoff with the police” had the police not kicked the door down, a contention that seems to be based on nothing whatsoever. (Answer 11.)

that someone suspected of a crime is armed; that cannot be enough. There must be some particular evidence of danger.

There was even less evidence of danger here than in *People v Oliver*, 417 Mich at 387. In *Oliver*, the burglar broke into a woman's home and threatened to kill her with a pair of scissors if she did not give him money. *Id.* at 371. Police found him at a motel. *Id.* at 372. When he opened the door, he asked if the officers had a warrant. *Id.* They entered and seized numerous items. The defendant later confessed but argued he was so intoxicated he lacked the specific intent to commit the burglary. *Id.* This Court reversed the lower courts for failing to suppress the evidence seized from the motel. The Court held this was not a "crime of violence" and that "there was no reason to believe that the safety of the officers or anyone else was in jeopardy." *Id.* at 384-385. It then reversed the convictions for failure to suppress the evidence. *Id.* at 387.

The Court of Appeals decision here cannot be reconciled with this Court's decision in *Oliver*. The person committing the robbery in this case never threatened anyone or acted as if he had a weapon, much less brandished one. Yet the Court of Appeals held that the robbery here was a "crime of violence." (COA Op 3.) The Court should reject this characterization and hold that the "narrow range of circumstances that present a *real danger* to the police or the public" do not exist here. *People v Oliver*, 417 Mich at 384 (emphasis added). Otherwise, the circumstances that qualify for forceful entry into a home without a warrant in the night have just expanded exponentially to cover every incident where the criminal was potentially armed. That is almost always the case. "Such a broad interpretation of the exigent circumstances doctrine would eliminate the constitutional presumption against warrantless intrusions." *Id.* at 381.

II. Mr. Horacek's plea was conditional under MCR 6.301(C)(2), or else it was constitutionally invalid.

In its answer, the government all but concedes that Mr. Horacek's plea was a conditional one. As shown in the transcript excerpted in the government's answer, the trial judge affirmatively told Mr. Horacek he could appeal the suppression motion despite the plea. (Answer 16-17.) Everyone in the court room was under the impression that Mr. Horacek's right to appeal was preserved, including Mr. Horacek. The only implication that can reasonably be drawn from this is that the plea was conditional. If no relief from the plea could be obtained through the appeal, it would be a pointless exercise, one the appellate courts could not even entertain. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief."). The appeal would not be preserved, contrary to what the trial court told him.

Once Mr. Horacek entered the plea with the understanding that his plea was conditional, the question of whether MCR 6.301(C)(2) is satisfied by the tacit consent of the prosecutor becomes academic. If the plea is not conditional under MCR 6.301(C)(2), as Mr. Horacek was lead to believe, then it was not entered knowingly and voluntarily, and is constitutionally invalid. *People v Cole*, 491 Mich 325, 332-33; 817 NW2d 497, 501 (2012) ("For a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing."). No matter how the Court interprets MCR 6.301(C)(2) going forward, Mr. Horacek must have the right to withdraw his plea if he prevails in his appeal of the suppression motion.

Moreover, to directly answer the question posed by the Court, MCR 6.301(C)(2) does not incorporate the "prosecutability" requirement imposed in *People v Reid*, 420 Mich 326; 362 NW2d 655 (1984), nor should it. It merely provides that the plea may be withdrawn "if a

specified pretrial ruling is overturned on appeal.” Given that MCR 6.301(C)(2) was enacted in response to *Reid*, one can only surmise that this omission was intentional. See MCR 6.301, 1989 Staff Comment. This Court, with the benefit of hindsight, decided to enact a much broader rule than contemplated by the holding of *Reid*. Until this case, the Court of Appeals has repeatedly allowed defendants to withdraw their pleas without regard for whether the prosecution can proceed. See, e.g., *People v Jones*, No 281816, 2009 WL 529628, at *3 (Mich Ct App, Mar 3, 2009); *People v Kerr*, No 188951, 1996 WL 33357008, at *2 (Mich Ct App, Oct 1, 1996). The Court of Appeals’ opinion in this case is the *only one* to cite the prosecutability language from *Reid* since the enactment of MCR 6.301(C)(2) in 1989.

The People argue that reading the rule as written or failing to amend it to conform to *Reid* would mean that defendants could withdraw their pleas even if the error in the suppression motion or other ruling on which it was conditioned proved harmless. (Answer 21.) That is incorrect. If the error in the admission of evidence is harmless, it will not be overturned on appeal, MCR 2.613(A). And if the ruling is not overturned, the right to withdraw the plea will not be triggered. See MCR 6.301(C)(2). Amending the rule is not necessary to preserve the harmless error doctrine.

There is no sound reason to limit conditional pleas to those where the charge could not be brought at all. The conditional plea is a meaningful and worthwhile device so long as there is some reasonable likelihood that suppressing the evidence could make a difference in the outcome of the trial. Even if the defendant could not avoid prosecution, it makes little sense to force a defendant and the prosecution go through a potentially extensive and possibly pointless trial just to preserve an appeal of an improvidently denied pre-trial suppression motion.

III. The refusal to grant a suppression motion was not harmless.

When an error violates the federal constitution—here the Fourth Amendment—the burden rests on the “beneficiary of the error to prove, and the court to determine, beyond a reasonable doubt that there is no “ ‘reasonable possibility that the evidence complained of might have contributed to the conviction.’ ” *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994). The government is the beneficiary here. The burden is therefore on the government to show the suppression was harmless beyond a reasonable doubt. The government cannot carry that burden on this record, or rather, the lack thereof.

First, there is no dispute that the officers discovered narcotics and paraphernalia in the motel room. There is also no indication in the record that the right to bring drug related charges against Mr. Horacek was waived. This was still a possibility at the time Mr. Horacek entered into his plea. Mr. Horacek could have reasonably believed that bringing those charges at the same time as the unarmed robbery conviction would make it more difficult for him to prevail at trial. Thus, denial of the motion to suppress this evidence could have reasonably influenced his decision to plea.

Second, Mr. Horacek believes the government also found keys to the vehicle in the motel room, which could have been used to link him to recent use of the vehicle and bolster the government’s case. There is of course no evidence of this in the record because the issue of what evidence officers collected from the illegal search and seizure is not developed below. At this point in the proceedings, the criminal defendant often is not fully aware of all of the evidence that was discovered or would be used at trial. And it is not necessary for Mr. Horacek to know this to establish that a Fourth Amendment violation occurred. If the government wishes to defeat the motion by establishing that no remedy is available because no pertinent evidence was

collected, it is the government's burden to make that showing. See *Anderson*, 446 Mich at 406. It failed to do so here.

Had the suppression motion succeeded, Mr. Horacek may have had an opportunity to pursue a different plea agreement with the government that could have resulted in a lower sentence. At the very least, Mr. Horacek could have decided to go to trial based on the suppression of the evidence that resulted from the illegal arrest.

CONCLUSION AND REQUESTED RELIEF

Arguments of counsel are not evidence from which factual determinations can be made as to whether a Fourth Amendment violation occurred. Disregarding this axiom, the trial court erroneously denied Mr. Horacek's Suppression Motion on factual statements of counsel that would not establish a Fourth Amendment violation even if they were true. The Court of Appeals erred in affirming that decision. For the reasons given above, Mr. Horacek respectfully requests that this Court reverse the trial court and the Court of Appeals and order that his Suppression Motion should be granted. If the lack of factual development is in any way attributed to a failure on the part of Mr. Horacek's counsel, Mr. Horacek respectfully requests that this Court remand this matter to the trial court for an evidentiary hearing on those issues, or a *Ginther* hearing on whether trial counsel was ineffective.

Respectfully submitted,

Dated: June 24, 2016

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